BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CHARLES R. DINNEEN	)	
Claimant	)	
V.	)	
	)	
GRIFFITH STEEL ERECTION, INC.	)	CS-00-0267-393
Respondent	)	AP-00-0450-124
AND	)	
	)	
AMERICAN INTERSTATE INS. CO.	)	
Insurance Carrier	)	

ORDER

The respondent and its insurance carrier (respondent), through Terry J. Torline, appealed Administrative Law Judge (ALJ) Pamela J. Fuller's Award on Remand dated March 17, 2020. Kenton D. Wirth appeared for the claimant. The Board heard oral argument on July 9, 2020. The Board considered the record and the parties' stipulations listed by the ALJ in the Award, as well as the parties' stipulation filed on June 13, 2018.

ISSUES

1. Did the claimant sustain personal injury by accident arising out of and in the course of his employment on April 28, 2015?

2. Are the respondent's medical depositions part of the record?

3. What is the nature and extent of the claimant's disability?

4. Did the claimant willfully fail to use fall protection and or recklessly violate the respondent's safety rules or regulations? Part of this issue includes whether Occupational Safety and Health Administration (OSHA) interpretive letters should be part of the evidentiary record.

5. Are benefits disallowed based on the claimant's urine drug screen (UDS)? Should the drug screen results have been admitted into evidence?

6. What was the claimant's average weekly wage (AWW)?

7. Is the claimant entitled to future medical treatment and the statutory unauthorized medical allowance?

8. Are the claimant's medical bills admissible? If so, is the claimant entitled to payment of past medical bills associated with his work injury?

FACTS

This case concerns an injury by accident on April 28, 2015. The claimant, currently 56 years old, worked as a journeyman ironworker for the respondent from 2012 forward. He previously worked for the respondent as an ironworker and worked, off and on, as an ironworker dating back to 2003. The claimant, a union member, was subject to random drug tests and took one approximately one month before his work accident. The claimant signed a document allowing the respondent to drug test him in the event of a work injury.

The day of the accident, the claimant was scheduled to work at 7 a.m. He arrived at work early and spoke with the respondent's owner, Jerry Griffith. Subsequently, the respondent's foreman, Clayton Leiker, arrived to direct job duties. Mr. Leiker told the claimant they were going to install steel perimeter angle on top of a building. Such work is called "connecting." To install steel, they used spud wrenches, 18-20" tools carried in a tool belt, which is part of a harness. The claimant and Mr. Leiker used a scissor lift (lift) with a three-foot tall railing to ascend to the work area 18-20' above ground. The two men began working side by side at 7 a.m. and went up and down together in the lift five or six times before the accident. Two other employees used a lift in a separate area. According to the claimant, neither he, his supervisor nor the other two workers were using a safety line, called a lanyard, which can be connected to a worker's harness.

At about 9 a.m., the claimant and Mr. Leiker intended to descend in the lift to get more material. Mr. Leiker stepped down from a beam into the lift. As the claimant began stepping into the lift, his spud wrench, which was in his tool belt, became stuck between steel and a block wall and jerked him back, causing him to miss the lift and fall on a concrete slab. The claimant's left leg was badly broken and he fractured his left wrist.

The claimant was transported to St. Catherine Hospital in Garden City. By his account, he was heavily medicated. The claimant was transported to Wesley Medical Center (WMC), where he had surgery for his broken left leg. His left wrist was placed in a cast. A WMC document titled "TRAUMA RESUSCITATION" states a UDS was needed. The test was done and it revealed a concentration at or above 300 nanograms per milliliter (ng/ml) for opiates and at or above 1,000 ng/ml for amphetamines.

The claimant required additional leg surgeries on May 1 and June 15, 2015.

The claimant provided an evidentiary deposition on July 29, 2015. He testified the distance between the edge of the building he was working on and the edge of the lift was four or four-and-one-half feet. He denied using medication or illegal drugs in the week prior to, or just before, his fall. He testified fall protection for steel erection crew workers is covered by subpart R of OSHA regulations. He testified such rules allow ironworkers the choice of using a lanyard when working between 15-30' above ground, but they must be tied off at 30' or higher.

On August 17, 2015, John McMaster, M.D., prepared a report at the respondent's request. The doctor reviewed the claimant's medical records and deposition. The doctor noted the UDS was performed in the normal course of treatment to protect the claimant's health and welfare. Dr. McMaster stated no medical, scientific or technical evidence suggested a reasonable medical explanation for the claimant's positive test for amphetamines, apart from abuse or misuse. Dr. McMaster stated the presence of amphetamines in excess of 1000 ng/ml was unrelated to any medication in the weeks, days or hours prior to the claimant providing the urine sample. Based on the level of amphetamines identified and the doctor's knowledge, training and experience of the physiologic effects on an individual who is otherwise amphetamine naive, Dr. McMaster opined use/abuse of amphetamines represented a significant contributory factor leading to the claimant's impaired capacity, competence and judgment with respect to performing dangerous activities at heights.

Dr. McMaster's report did not comment about the claimant's spud wrench being stuck between steel and concrete block. The report mistakenly indicated the claimant fell off the lift, instead of falling when trying to get into the lift.

A preliminary hearing occurred September 1, 2015. The claimant clarified he was not trying to step four-and-one-half feet into the lift, but "stepped into the web of another beam which cut the distance" to approximately two feet. The claimant denied violating any safety rule, company rule, or OSHA rule when trying to step into the lift. He testified his supervisor never accused him of violating any safety rule or told him to get into the lift in a different manner. Getting in and out of a lift can be done dozens of times in a work day. The claimant testified OSHA rules gave him the option to use a lanyard between 15-30' above ground. He denied taking any opiates or amphetamines immediately prior to his work accident.

At the hearing, the respondent offered Exhibits 5 and 6 as OSHA interpretive letters concerning working from a lift. Consistent with his earlier deposition, the claimant testified the OSHA letters did not apply to ironworkers. He testified OSHA rules allow ironworkers more freedom to move about at heights.

After the hearing, the ALJ ruled no safety violation occurred, but denied benefits because the claimant was presumptively impaired by drugs. A single Board Member reversed the ALJ's denial of benefits after finding K.S.A. 44-501(b)(3) requirements precluded admission of the drug test. The Board Member found insufficient evidence to establish the claimant was impaired by illegal drugs.

The claimant underwent a second evidentiary deposition on February 28, 2018. He acknowledged a discrepancy in prior testimony regarding the distance between the steel and the lift. The claimant testified Mr. Griffith observed the work he performed between 7 and 9 a.m., and never accused him of being impaired or contended he was violating any safety regulation.

The claimant testified the respondent promoted him to being a general foreman. At the time of the accident, he was earning $21.45 per hour, overtime pay and a per diem. The promotion raised his pay to nearly $24 an hour and the per diem continued. With the promotion, the respondent also gave the claimant a company credit card and a company truck. As a general foreman, the claimant is responsible to train workers about job safety and he conducts weekly safety meetings. His job requires him to occasionally read OSHA regulations, which he does at least three or four times on every job.

The second deposition included the claimant's testimony that wearing a tool belt with a spud wrench carries a common risk of getting "stuck in the steel" or pushing workers off a structure.[1] He encountered this risk at least a dozen times and saw it occur with other workers. The record contains no safety rules or regulations regarding spud wrenches. The respondent presented many questions, paraphrased below, as to what the claimant could have done with his spud wrench before trying to get into the lift, including:

- Whether the claimant could have taken his spud wrench out of his tool belt and placed it in the lift before attempting to get in the lift? The claimant responded, "we don't make a habit of throwing our tools."[2]

- Whether the claimant could have handed his spud wrench to Mr. Leiker? The claimant testified workers carry their tools in special spots in their tool belts,[3] but handing tools to a coworker in a lift is simply not done.

- Whether the claimant could have removed his tool belt and handed it to Mr. Leiker? The claimant said he could not because the tool belt is part of his harness.

- Whether the claimant could have removed and handed his harness and tool belt to Mr. Leiker? The claimant noted he would not sit on a steel structure and undress by removing various straps, including leg and shoulder straps.

According to the claimant, he tried to get into the lift in the exact manner successfully employed by Mr. Leiker just prior to the accident. Mr. Leiker did not instruct the claimant to get into the lift differently. The claimant denied being reprimanded or disciplined by the respondent for not being tied off. As far as the claimant knew, the respondent was never fined or penalized for a safety violation stemming from his accident. The claimant testified he and Mr. Leiker were using the lift the same way they normally did.

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[1] Claimant's Depo. (February 28, 2018) at 17.

[2] *Id.* at 44.

[3] *Id.*

At the claimant's second deposition, his medical bills were offered into evidence. The respondent objected based on hearsay and lack of foundation. The claimant testified he reviewed the medical bills and none of them appeared unrelated to his work injury.

At the regular hearing on May 7, 2018, the ALJ set the claimant's terminal date for June 11, 2018, and the respondent's terminal date for July 11, 2018. A terminal date is a deadline for submitting evidence. The ALJ subsequently granted the claimant's motion for an extension of time and established new terminal dates of October 15 for the claimant and November 15 for the respondent. The claimant presented billing records affidavits at the regular hearing.

The respondent, on November 12, 2018, requested an extension of its terminal date to December 19, 2018, asserting inability to schedule depositions of Drs. McMaster and Fevurly. Those depositions were taken on December 19, 2018. On January 7, 2019, and February 12, 2019, the claimant's counsel objected in writing to the extension of the respondent's terminal date. A motion hearing regarding the respondent's terminal date was held on February 13, 2019. The parties presented arguments, and the ALJ, both verbally and in a written order, extended the respondent's terminal date to February 13, 2019, which allowed the respondent's medical expert depositions into evidence.

Two certified medical review officers, Dr. McMaster and Angela S. Moore, D.O., testified. A medical review officer (MRO), is a physician who reviews drug tests and provides opinions to third parties as to whether reasonable medical explanations exist for positive drug test results. Both Dr. McMaster and Dr. Moore testified a MRO should only make determinations regarding drug screens after a confirmatory test is performed.

One of the exhibits at Dr. McMaster's deposition was a letter dated June 12, 2018. The doctor reiterated there was no reason for the claimant to test positive for amphetamines absent amphetamine abuse. Dr. McMaster concluded: (1) the claimant's ability to safely walk on steel beams was impaired by drug use and he was unable to immediately correct his risky behavior – loss of footing and balance – because he was on drugs; (2) the claimant's unimpaired coworker, Mr. Leiker, was able to get into the lift, but the claimant was not due to impaired psychomotor skills; (3) the claimant demonstrated neurocognitive dysfunction, including reduced judgment, decreased fine motor skills and risk-taking behavior, by having an inadequately secured or protected spud wrench; and (4) the claimant's attempt to cross a four to four-and-one-half foot gap to the lift showed he was on drugs. Dr. McMaster testified the claimant erred in judgment by not being tied off. The doctor testified the claimant took unnecessary risks and exhibited poor judgment because of lack of sleep and performing risky job tasks. Dr. McMaster's first report and his subsequent letter did not note the claimant and Mr. Leiker used the lift several times to ascend and descend the building site before the accident. Dr. McMaster testified the claimant's ability to successfully get in and out of the lift on several occasions prior to the accident was not relevant as to whether he had neurocognitive impairment.

Dr. McMaster defined the UDS test as "qualitative," not "quantitative." He acknowledged the UDS does not identify the total amount of drugs in a person, only whether amphetamines exceeded 1,000 ng/ml. The doctor was twice asked what the expected results would be "if" a confirmatory test, such as a gas chromatography-mass spectroscopy (GCMS) test, was done.[4] Dr. McMaster responded the confirmatory test would reveal the specific type and quantity of amphetamine, which would most likely exceed 1,000 ng/ml.

Dr. McMaster agreed no confirmatory test was performed on the urine sample. The doctor agreed a confirmatory test is meant to determine if the UDS properly identified what substance tested positive or whether something else caused the positive result. The doctor agreed a confirmatory test will rule out whether a substance with a similar chemical structure to amphetamines or "amphetamine-like substances"[5] caused the positive drug screen, but the initial drug screen will not do so. Dr. McMaster testified a UDS can show a false positive result, such as being due to overuse of a Vick's inhaler or over-the-counter (OTC) medication containing ephedrine. The doctor agreed if ephedrine caused the initial positive result for amphetamine, the confirmatory test would show zero amphetamines. However, the thresholds are typically high enough to avoid having ingestion of OTC drugs result in a positive test.

Dr. Moore testified at the claimant's request. Dr. Moore testified a UDS provides a presumptive result as positive or negative, but a confirmatory test, such as a GCMS, is required to prove a positive or negative test. She testified cross-reactivity can result in a drug not being tested showing up as a drug being tested. The doctor indicated false-positive results for amphetamines are the most common of any drug for which UDS testing is performed. Dr. Moore noted concern for adulterated test samples and laboratory errors. The doctor testified a UDS will not give any indication of a patient's incapacity or impairment at the time of testing and a MRO is absolutely not allowed to say drugs were in a patient's system solely based on a UDS; confirmatory testing is required to do so.

Dr. Fevurly testified the claimant had an 18% left lower extremity rating using the *AMA Guides to the Evaluation of Permanent Impairment* (4th ed.) (*Guides*, 4th ed.), and a 15% left lower extremity rating using the *AMA Guides to the Evaluation of Permanent Impairment* (6th ed.) (*Guides*, 6th ed.). He did not testify if the claimant had any left wrist impairment. The doctor stated no future medical treatment was needed for the claimant's left wrist fracture. While downplaying future medical for the claimant's left leg, Dr. Fevurly observed the claimant had hardware in his leg and may develop arthritis, and the claimant already had symptoms of cock-up toes due to his injury, a condition which naturally progresses in a normal person. Dr. Fevurly testified surgery for cock-up toes is "truly torture."[6] The doctor's report concerning the claimant was not admitted into evidence.

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[4] McMaster Depo. at 24, 63. The Legislature should have used the term "spectrometry."

[5] *Id.* at 41.

[6] Fevurly Depo. at 18.

George G. Fluter, M.D., testified on behalf of the claimant. According to the doctor, the claimant's description of his accident did not indicate he was impaired. Dr. Fluter diagnosed the claimant as having an open left distal tibia and fibula pilon fracture, as well as a left forearm fracture treated non-operatively. Dr. Fluter noted the claimant had pain every day, along with left ankle, knee, leg and wrist weakness. Using the *Guides*, 6th ed., the doctor rated the claimant's left lower extremity at 37% impairment and his left upper extremity at 13% impairment, the latter based on an 8% impairment to his wrist and a 5% impairment to his elbow. Using the *Guides,* 4th ed., the doctor assigned the claimant a 52% impairment to the left lower extremity and a 10% rating to the left upper extremity.

Dr. Fluter testified medical literature establishes a doctor cannot specifically determine the presence of a chemical based on a UDS only. He indicated no correlation exists between a UDS result and incapacity, impairment or performance of activities of daily living. The doctor had concerns the UDS may have been a false-positive result. Dr. Fluter testified he had not worked in an emergency room (ER) for about 30 years, but he generally noted ER drug testing is done to prevent potential harmful drug interaction and is part of the normal course of medical treatment for the health and welfare of patients.

The claimant offered his medical bills into evidence at Dr. Fluter's deposition. The respondent objected on the grounds of hearsay and lack of foundation. Dr. Fluter indicated there was nothing in the itemized statements that looked unrelated to the claimant's work injuries. Dr. Fluter testified there is a reasonable chance the claimant will need future medical treatment, including an ankle joint replacement or an ankle fusion. Arthritis could develop. His report stated future medical treatment was likely necessary.

Prior to the ALJ's initial Award, the claimant continued to object to including the depositions of Drs. Fevurly and McMaster in the record. The ALJ's initial Award discussed in detail the depositions of the two physicians, implicitly overruling the claimant's objection.

This claim previously came before the Board on the respondent's appeal of the ALJ's Award dated February 27, 2019. Our prior ruling remanded the claim for the ALJ to address: (1) the respondent's arguments the claimant willfully or recklessly violated safety rules; (2) calculation of the claimant's AWW; (3) the content of the record; and (4) objections raised by both parties.

Following the Board remanding this case to the ALJ, the respondent asked the ALJ to take judicial notice of the OSHA letters in a brief dated March 4, 2020. The claimant's responsive brief argued the OSHA letters did not pertain to his work and the respondent's request for judicial notice after terminal dates expired was unfair. The ALJ's Award on Remand noted a factual finding that "OSHA requires [the ironworkers] to have the option of being tied off between 15 and 30 feet and it is mandatory above 30 feet."[7]

[7] Award on Remand at 3.

On remand, the ALJ made many conclusions, including: (1) the claimant sustained injury by accident on April 28, 2015, arising out of and in the course of his employment; (2) which resulted in a 15% impairment to his left lower extremity; (3) the respondent's Exhibits 5 and 6 from a preliminary hearing, OSHA interpretive letters, were not in evidence; (4) a UDS test was inadmissible; (5) medical depositions secured by the respondent were part of the record and obtained within the respondent's terminal dates; (6) the claimant's AWW was $906.17; (7) certain medical bills were in evidence and ordered paid; and (8) the claimant was entitled to unauthorized and future medical treatment.

The respondent argues:

• the claimant did not prove he sustained an injury arising out of and in the course of his employment;

• the ALJ erred in not admitting a UDS result into evidence;

• benefits should be denied because the claimant's drug use contributed to his injury by accident;

• the ALJ erred in applying K.S.A. 44-501(b)(3) requirements for the admission of the UDS result obtained by an employer, requirements not needed if the drug test is done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

• the ALJ erred in not admitting OSHA interpretive letters into evidence and either the ALJ should have, or the Board should now, take judicial notice of the OSHA letters;

• benefits should be denied because the claimant willfully failed to use fall protection and/or recklessly violated the respondent's safety rules or regulations;

• the claimant's AWW should not include a per diem the ALJ found was discontinued;

• medical bills should have been excluded from evidence as lacking foundation and as hearsay;

• future medical treatment and the unauthorized medical allowance should be denied; and

• if compensable, the ALJ correctly limited the claimant's impairment rating to 15% of the left lower leg, and the claimant's medical expert's impairment ratings were not in accordance with the *Guides,* 6th ed.

At oral argument, the respondent agreed its defense regarding personal injury by accident arising out of and in the course of his employment is more accurately characterized as saying benefits should not be allowed based on drug or safety defenses.

The claimant disagrees with all of the respondent's arguments. The claimant generally would have the ALJ's ruling affirmed. However, he argues his impairment should be based on Dr. Fluter's ratings using the *Guides,* 4th ed. Further, the claimant argues medical depositions taken by the respondent should be excluded from the record because they were obtained after respondent's initial terminal date without good cause for an extension of time. Also, according to the claimant, there can be no presumption he was impaired based on a UDS without a confirmatory test. He asserts drug testing does not establish impairment.

PRINCIPLES OF LAW AND ANALYSIS

1. The claimant sustained personal injury by accident arising out of and in the course of his employment on April 28, 2015.

As stated above, the respondent agreed at oral argument that its denial of a compensable injury by accident arising out of and in the course of the claimant's employment is an argument more accurately focused on the position benefits should be disallowed based on drug impairment or safety rule violations. The claimant's attempt to move from a steel beam into the lift to get more material, and getting his spud wrench caught between structural steel and a concrete block wall, establish the causal connection between the work and his resulting accident. There is no dispute claimant sustained personal injury by accident arising out of and in the course of his employment, including the prevailing factor requirement, on April 28, 2015.

2. The depositions of Drs. McMaster and Fevurly are part of the record.

K.S.A. 44-523(a) states, "The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, ensure the employee and the employer an expeditious hearing and act reasonably without partiality." Section (b) states an extension of terminal dates may be granted by an ALJ for good cause.

Scheduling terminal dates or extending terminal dates for good cause are discretionary rulings that should not be disturbed on appeal absent a clear showing of an abuse of discretion. [8]

[8] See *Tull v. Atchison Leather Products, Inc.,* 37 Kan. App. 2d 87, 99, 150 P.3d 316 (2007).

"The overarching purpose of the hearing process lies in giving the parties a reasonable opportunity to fairly air the evidence bearing on the claim for benefits."[9] "Generally, the Board will not interfere with judges' discretion in controlling their dockets."[10]

The ALJ extended the respondent's terminal date and allowed the depositions of Drs. McMaster and Fevurly after a hearing. The ALJ discussed the testimony of Drs. McMaster and Fevurly at length in the initial Award dated February 27, 2019, and listed the depositions as part of the record. The ALJ ruled the depositions were admissible and the respondent's terminal date was extended for good cause. The ALJ had wide discretion to extend the respondent's terminal date and allow the depositions. The Board sees no reason to disagree.

3. Due to his accidental injury, the claimant sustained a 26% impairment to his left lower leg and a 13% impairment to his left arm.

The claimant argues his impairment should be determined using the *Guides*, 4th ed., based on *Pardo*.[11] That decision held use of the *Guides*, 6th ed., was unconstitutional to ascertain Mr. Pardo's work-related shoulder impairment and Mr. Pardo's impairment should be based on the *Guides*, 4th ed. Here, the claimant specified at oral argument he is not asserting use of the *Guides*, 6th ed., is unconstitutional, but *Pardo* is correct and applies across the board. While the claimant argues *Pardo* applies to all workers compensation claims, *Pardo* specifically states multiple times the ruling was limited to the constitutionality of the *Guides*, 6th ed., as applied only to Mr. Pardo.[12] *Pardo* does not apply and the Board will continue to use the *Guides*, 6th ed., pending the outcome of *Johnson*.[13]

K.S.A. 44-510d(b)(24) states, "Where an injury results in the loss of or loss of use of more than one scheduled member within a single extremity, the functional impairment attributable to each scheduled member shall be . . . combined pursuant to the sixth edition of the American medical association guides to the evaluation of permanent impairment, and compensation awarded shall be calculated to the highest scheduled member actually impaired."

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[9] *Goss v. Century Mfg., Inc.*, No. 108,367, 2013 WL 3867840, at *3 (Kansas Court of Appeals unpublished opinion filed July 26, 2013).

[10] *Vargas-Jaramillo v. Marriott International, Inc.*, No. 241,554, 2001 WL 403320 (Kan. WCAB Mar. 9, 2001).

[11] *Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 422 P.3d 1185 (2018).

[12] See *id.* at *4, *10, *25 and *27.

[13] *Johnson v. U.S. Food Service*, 56 Kan. App. 2d 232, 427 P.3d 996 (2018), *rev. granted* (Feb. 28, 2019).

Using the *Guides*, 6th ed., the Board determines the claimant sustained a split of the impairment ratings from Drs. Fevurly and Fluter, or 26% to the left lower leg. Dr. Fluter's opinion regarding the permanency of the claimant's left wrist injury, the only evidence of left arm impairment, was not sufficiently contradicted, if at all. The Board finds the claimant sustained a 13% left arm impairment due to his work injury.

4. Did the claimant willfully fail to use fall protection or recklessly violate the respondent's safety rules?

A. The ALJ did not err in declining to take judicial notice of the OSHA interpretive letters or admit them into evidence.

The Board first addresses the respondent's complaint regarding the OSHA interpretive letters, Exhibits 5 and 6, which had been offered at a preliminary hearing. The ALJ did not take judicial notice of the exhibits and ruled the exhibits were not part of the evidentiary record. The ALJ, citing pages 13-14 of the regular hearing transcript, noted the parties only agreed to let the claimant's preliminary hearing testimony into evidence, but not the exhibits attached to the preliminary hearing transcript.

The Board's review of an order is de novo on the record.[14] A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the ALJ.[15] On de novo review, the Board makes its own factual findings.[16]

The Kansas Court of Appeals ruled judicial notice applies to workers compensation proceedings.[17] We need not repeat the entire content of K.S.A. 60-409, but judicial notice pertains to knowledge generally beyond dispute. The respondent presented no witnesses or proof indicating the OSHA interpretive letters applied to the claimant. The claimant denied the OSHA letters applied to ironworkers engaged in connecting work. He asserted different OSHA rules applied to ironworkers. Basically, the claimant argued the OSHA letters were irrelevant. Courts do not need to take judicial notice of irrelevant material.[18]

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[14] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[15] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[16] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr*., No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[17] See *Willoughby v. Goodyear Tire & Rubber*, No. 115,898, 2017 WL 658267 (Kansas Court of Appeals unpublished opinion filed Feb. 17, 2017).

[18] See *Nyanjega v. Douglas*, 793 Fed. App'x 468, 469 (8th Cir. 2020); see also *Sameer v. Right Move 4 U*, 787 F. App'x 473, 474 (9th Cir. 2019).

The Board often gives some deference to an ALJ's findings concerning credibility where the ALJ observed the testimony in person.[19] "Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[20] The ALJ believed the claimant: he had the option to use a lanyard when working between 15-30' high. The claimant's experience in steel construction as a journeyman and a foreman establishes he knows the OSHA rules. He testified the OSHA letters do not apply to ironworkers doing connecting work. The claimant is credible, and the Board affirms the judge's decisions to exclude the OSHA letters from evidence and in declining judicial notice.

B. The claimant did not willfully fail to use fall protection or recklessly violate the respondent's safety rules.

K.S.A. 44-501(a) disallows compensation for an injury when the employee willfully fails to use an employer-provided guard or protection required by any statute, the employee willfully fails to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer, or the employee recklessly violates the employer's workplace safety rules or regulations. However, these rules do not apply when it was reasonable to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

K.A.R. 51-20-1 states, "The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation."

Carter states:

> "[W]illful," . . . includes the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . "Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse." [21]

Under K.S.A. 44-501b, the burden of proof is on the worker. However, an employer must prove any affirmative defenses.[22]

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[19] *Foy v. Kansas Coachworks, LTD*, No. 1,051,265, 2014 WL 1758032 (Kan. WCAB Apr. 21, 2014).

[20] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

[21] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 85, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987) (quoting *Bersch v. Morris & Co.*, 106 Kan. 800, 804, 189 Pac. 934 (1920)).

[22] See *Johnson v. Stormont Vail Healthcare, Inc.*, 57 Kan. App. 2d 44, 445 P.3d 1183 (2019), *rev. denied* ___ Kan. ___, ___ P.3d ___ (Feb. 25, 2020).

The respondent asserts this case mirrors *Buck*.[23] Mr. Buck, a roofer, was injured after falling from a slick roof. Mr. Buck's employer told him many times to wear a safety belt while working on a roof. Mr. Buck was told he would lose his job otherwise, but he was not wearing a safety belt when he fell. Mr. Buck knew the rule. Witnesses indicated Mr. Buck felt "dorky" when wearing the safety belt. His girlfriend said the safety belt made Mr. Buck look "corny." A coworker testified Mr. Buck and Mr. Buck's brother would only hastily put on the safety belts if the company owner arrived on the job site. Mr. Buck's brother fell a short distance from the roof earlier that day, but was not injured. Mr. Buck and his brother laughed about the incident, but continued working without safety belts. Admittedly, Mr. Buck would not have fallen and suffered injury had he been wearing the safety belt. There was evidence Mr. Buck dishonestly alleged there were not enough safety belts on the job, so he purportedly gave his safety belt to a less experienced worker. The Board denied compensation because Mr. Buck willfully failed to use a safety guard or protection.

This case is similar to *Anderson*,[24] in which a journeyman electrician was working on a telephone pole. His foreman supervised him from the ground. The foreman knew Anderson was not wearing protective rubber gloves close to a potential power source, but did not tell him to put on rubber gloves as a safety measure because he viewed Anderson as a precise worker. The employer, through the foreman, thus approved and allowed Anderson's failure to use rubber gloves.

Here, no safety violation occurred in the first place. Under OSHA rules, the claimant did not have to use a lanyard when connecting 15-30' above ground. The respondent presented no witnesses alleging the claimant violated any safety rules. If the claimant actually violated a safety rule, it would seem particularly peculiar for the respondent to subsequently promote and entrust him to teach safety to subservient employees.

In this case, all four workers using lifts on the job site, including the supervisor and the claimant, were not using lanyards. The practice of not using a lanyard, even if it was a rule, was approved by the respondent through the supervisor's action or inaction. Hypothetically, even if there was a rule mandating use of a lanyard between 15-30' (there was not) and the claimant willfully failed to use fall protection or recklessly violated the respondent's safety rules (he did not), K.S.A. 44-501(a)(1)(C) does not disallow compensation because his supervisor tacitly approved the work to be performed without a lanyard. Further, there were no rules about how to get into the lift. The claimant tried to get into the lift in a fashion identical to his supervisor. Mr. Leiker did not tell the claimant to get into the lift in a different manner.

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[23] *Buck v. Custom Roofing*, No. 199,552, 1995 WL 598234 (Kan. WCAB Sep. 21, 1995).

[24] *Anderson v. PAR Elec. Contractors, Inc.*, No. 118,999, 2018 WL 6074279 (Kansas Court of Appeals unpublished opinion filed Nov. 21, 2018).

The respondent argues the claimant could have been safer with his spud wrench. Apparently, the respondent asserts the claimant should not have had his spud wrench where it specifically goes in his tool belt/harness. This argument is rejected. The claimant was performing work in the manner he and his coworkers routinely did. There is no statutory defense a worker could have avoided an accident by performing the work differently than how the work is done in the normal course. The record is devoid of any safety rules or regulations concerning spud wrenches. There is no rule requiring the claimant to remove his spud wrench or harness and throwing such items into the lift or handing them to Mr. Leiker before attempting to enter a lift. Even if there was a rule regarding the spud wrench (there was not), the rule was not enforced.

Finally, if a lanyard is used, it is connected to the harness/tool belt. The respondent argues the claimant should have been tied off with a lanyard. If the claimant should have removed his harness/tool belt to get into the lift, as suggested by the respondent, he could not have been tied off with a lanyard. The respondent cannot have it both ways.

5. The claimant is not precluded from compensation based on his injury allegedly being contributed to by drug impairment.

K.S.A. 44-501(b)(1)(A) provides, "The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of . . . any drugs . . . ."

Section (1)(C) of the statute conclusively presumes the employee was impaired due to drugs if, at the time of the injury, the employee had a GCMS confirmatory test by quantitative analysis showing a concentration at or above the 2000 ng/ml for opiates or 500 ng/ml for amphetamines. In such case, there is a rebuttable presumption the accident, injury, disability or death was contributed to by such impairment, but the employee may overcome the presumption of contribution by clear and convincing evidence.

Section (2) indicates the results of a chemical test are admissible evidence to prove impairment if the employer establishes that the testing was done based on an employer-mandated drug testing policy, during the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer, or the worker gave prior written consent to the employer that the worker would voluntarily submit to a chemical test following any accident or injury.

Section (3) states chemical test results obtained by an employer are not admissible unless six conditions are met, such as a reasonable collection time, performed by or under the supervision of a licensed health care professional, in an approved laboratory, confirmed by GCMS or other comparably reliable analytical method, the test results were, beyond reasonable doubt, from the sample taken from the employee; and a split sample sufficient for testing was retained and made available to the employee within 48 hours of a positive test.

The Board disagrees with the single Board Member's preliminary ruling that K.S.A. 44-501(b)(3) applies. The plain statutory language of K.S.A. 44-501(b)(3) says the six conditions listed therein do not apply when a drug test is obtained in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer.[25]

We conclude the UDS was performed in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer. Dr. McMaster has not worked at WMC for many years and Dr. Fluter has not worked in an ER for decades. However, both either knew or thought WMC or emergency rooms generally perform drug and alcohol testing in the normal course of medical treatment for the health and welfare of a patient. Based on a preponderance of the evidence, the UDS result is admitted under K.S.A. 44-501(b)(2)(B).[26] There is no evidence the respondent requested the UDS.

The respondent has the burden to prove the claimant's drug impairment contributed to his injury. The UDS result for opiates was positive for equal to or more than 300 ng/ml, far less than the 2,000 ng/ml required by K.S.A. 44-501(b)(1)(C). Amphetamines registered at or over 1,000 ng/ml, far more than the cut-off of 500 ng/ml. Naturally, the respondent focuses on the positive amphetamine test. However, Kansas workers compensation appellate cases emphasize literally interpreting and applying plainly-worded workers compensation statutes.[27] For the presumption of drug impairment to apply, K.S.A. 44-501(b)(1)(C) mandates GCMS confirmatory testing by quantitative analysis. No GCMS testing by quantitative analysis of the UDS occurred. Because there was no GCMS confirmation, there is no statutory presumption of impairment for either opiates or amphetamines. Further, absent a GCMS test, there is no need for the claimant to present clear and convincing evidence to rebut any presumption of impairment.

Absent the statutory presumption, we are left with the evidence. There is insufficient evidence the claimant was impaired by illegal drugs or his injury was contributed to by use of drugs. Mr. Griffith did not accuse the claimant of being impaired when the claimant showed up to work early and they discussed the project. There is no testimony from the respondent, such as from Mr. Leiker, to suggest the claimant was impaired. Mr. Leiker and the claimant worked side-by-side for two hours on April 28, 2015. If the claimant was impaired, perhaps Mr. Leiker would have provided testimony.

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[25] See *Hinds v. Excellence in Drywall*, No. 1,059,822, 2013 WL 2455706, at *7 (Kan. WCAB May 16, 2013); see also *Jones v. Junction City Wire Harness*, No. 1,059,933, 2013 WL 485708 (Kan. WCAB Jan. 31, 2013).

[26] On page 13 of "CLAIMANT'S BRIEF TO APPEALS BOARD" dated May 20, 2020, the claimant argues all workers should have equal protection of the law to ensure reliable testing by enforcing foundational proof as required by K.S.A. 44-501(b)(3)(A-F). "[T]he Board . . . lacks the authority to rule on the constitutionality of any statute, including K.S.A. 44-501 *et seq.*, the Workers Compensation Act (the Act)." *Pardo, supra at* 10.

[27] See *Hoesli v. Triplett*, 303 Kan. 358, 362, 361 P.3d 504 (2015).

Dr. McMaster's opinions are insufficient to show the claimant's injury was contributed to by drug use. Unlike as believed by Dr. McMaster, the claimant did not have a lapse of judgment in not tying off with a lanyard; he and all of the other three workers in lifts were not using lanyards. The claimant had the option to tie off with a lanyard when working between 15-30' high, but did not do so. Having a choice is not proof of being impaired by drugs. The claimant's attempt to get into the lift in the same manner as his supervisor is not a lapse in judgment. On five or six occasions, Mr. Leiker and the claimant were equally able to get in and out of the lift. Dr. McMaster's belief the claimant was unable to safely walk on steel beams is incorrect. The accident was not caused by a slip, misstep, loss of footing or decreased coordination. The claimant fell because his spud wrench got stuck.

Dr. McMaster assumed the claimant should have secured or protected his spud wrench in some unexplained fashion. Where he gets this theory is unknown. The record does not support this assumption. The doctor's first report mentions nothing about the spud wrench. An ironworker having his spud wrench in his tool belt, i.e., where it belongs, is not evidence of mental dysfunction, bad judgment, reduced motor skills or a needless risk. Amphetamines did not cause the wrench to get lodged. The claimant testified a spud wrench is a known work-related risk and it is not uncommon for the wrench to get lodged or push a worker off a steel structure.

Dr. McMaster's opinions are faulty for additional reasons. The doctor was wrong to indicate the claimant tried to step across a four to four-and-one-half gap from a beam to the lift. While this was the claimant's initial testimony, he later testified the distance was approximately two feet. Dr. McMaster noted the claimant had lack of sleep, but there is no corroborating evidence in the record. Dr. McMaster saying an ironworker takes unnecessary risks because the tasks of an ironworker are risky is obvious, but not proof of drug-induced impairment. According to Drs. McMaster and Moore, MROs should not or can not form an opinion as to impairment due to drugs absent a confirmatory test, such as a GCMS test. Yet, Dr. McMaster's opinion substantially relies on the unconfirmed UDS result.

The UDS test result is in evidence. Absent a GCMS test, there is no statutory presumption of impairment under K.S.A. 44-501(b)(1)(C). The respondent did not prove the claimant was impaired by drugs or drug impairment contributed to his injury by accident.

6. The claimant's AWW at the time of the accident was $906.17.

The parties agreed the claimant's AWW was $834.25. This figure did not include the claimant's per diem, which was $1,870 during the 26 weeks prior to his accident. The ALJ incorrectly indicated the per diem had been discontinued and should be included in computing his AWW. The respondent alleges the per diem should not be included in the claimant's AWW because he still works for the respondent and still receives the per diem.

Ridgway,[28] a case that does not follow our current statute regarding how to calculate the AWW, discusses the definition of "compensation." In *Ridgway*, compensation was defined as a real economic gain, as opposed to expense reimbursement. In *Ridgway*, a $225 monthly car allowance was a real economic gain for the claimant, as he pocketed the money, which he characterized as "gravy," and properly included in calculating his AWW. However, the uniform allowance was not included in computing his AWW because it was only used to maintain a clean uniform, such that no economic gain was established.

In part, K.S.A. 44-511 states, in part:

> (a)(1) The term "money" shall be construed to mean the gross remuneration . . . earned while employed by the employer, including bonuses and gratuities. Money shall not include any additional compensation, as defined in paragraph (2).
>
> (2) (A) . . . "[A]dditional compensation" shall include and mean only the following: (i) Board and lodging when furnished by the employer as part of the wages . . .; and (ii) employer-paid life insurance, disability insurance, health and accident insurance and employer contributions to pension and profit sharing plans.
>
> . . .
>
> (C) Additional compensation shall not be included in the calculation of average wage until and unless such additional compensation is discontinued. If such additional compensation is discontinued subsequent to a computation of average weekly wages under this section, there shall be a recomputation to include such discontinued additional compensation.
>
> (3) The term "wage" shall be construed to mean the total of the money and any additional compensation that the employee receives for services rendered for the employer in whose employment the employee sustains an injury arising out of and in the course of such employment.
>
> (b)(4) In determining an employee's average weekly wage with respect to the employer against whom claim for compensation is made, no money or additional compensation paid to or received by the employee from such employer, or from any source other than from such employer, shall be included as wages, except as provided in this section. No wages, other compensation or benefits of any type, except as provided in this section, shall be considered or included in determining the employee's average weekly wage.

There is insufficient evidence the per diem was "additional compensation," such as board and lodging. The claimant's receipt of a per diem was an economic benefit and was properly included in computing his AWW.

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[28] *Ridgway v. Board of Ford County Commissioners*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), *rev. denied* 242 Kan. 903 (1988).

7. The claimant is entitled to future medical treatment and the statutory unauthorized medical allowance.

K.S.A. 44-510h states, in part:

> (b)(2) Without application or approval, an employee may consult a healthcare provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such healthcare provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.
>
> . . .
>
> (e) It is presumed that the employer's obligation to provide the services of a health care provider . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

The Board concludes the claimant more likely than not will require future medical treatment based on evidence from Drs. Fluter and Fevurly.

8. The claimant's medical bills are admissible and he is entitled to payment of past medical bills associated with his work injury.

The Board previously ruled the ALJ admitted the claimant's medical bills into evidence and ordered the respondent to pay such bills. However, in remanding the case, the Board wanted the ALJ to rule on the respondent's objections to the medical bills.

K.S.A. 44-510h(a) states:

> It shall be the duty of the employer to provide the services of a healthcare provider and such medical, surgical and hospital treatment . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 44-519 provides:

> Except in preliminary hearings . . ., no report of any examination of any employee by a health provider . . . shall be competent evidence . . . for the determining or collection of compensation unless supported by the testimony of such health care provider . . . and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

"K.S.A. 44-519 is not a technical rule of evidence. Rather it is a specific legislative mandate."[29] Further, "The workers compensation system has been well served by requiring the opinions of experts to be based on testimony subject to cross-examination . . . ."[30] K.S.A. 44-519 "literally applies only when a party seeks to introduce a report or certificate of a physician or surgeon into evidence."[31]

The respondent argues K.S.A. 44-519 precludes admission of the medical bills absent testimony of the health care provider. The respondent cited *Berscheidt,*[32] in which a pro se litigant delivered medical records and bills to the ALJ after terminal dates expired without testimony from the medical providers. In that case, the Board cited K.S.A. 44-519 and ruled all the records were inadmissible absent supporting testimony. *Berscheidt* is distinguishable. The medical evidence should not have been admitted once terminal dates expired, unless the ALJ reopened the record. *Berscheidt* is not a blanket prohibition against medical bills coming into evidence.

The Board has allowed medical bills into evidence as being related to the work injury based on a claimant's testimony.[33] Similarly, medical bills are admissible based on a physician's testimony.[34] Here, the claimant and Dr. Fluter identified the bills as related to the work injury. Also, the claimant presented affidavits from the medical providers regarding the authenticity of the bills and affirming the bills were kept in the ordinary course

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[29] *Roberts v. J. C. Penney Co.*, 263 Kan. 270, 278, 949 P.2d 613 (1997).

[30] *Id.* at 282.

[31] *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 130, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989).

[32] *Berscheidt v. Walmart Warehouse # 6035*, No. 5,014,634, 2012 WL 1652985 (Kan. WCAB Apr. 10, 2012).

[33] See *Potter v. Walker Constr.*, No. 1,062,835, 2014 WL 2616660, at *8 (Kan. WCAB May 12, 2014); *Garoutte v. Osmose Utilities Service*, No. 1,033,041, 2012 WL 6101105, at *9 (Kan. WCAB Nov. 14, 2012); *Castleman v. State of Kansas*, No. 1,040,867, 2008 WL 5122324, at *4 (Kan.WCAB Nov. 14, 2008); and *Johnson v. Cambridge Place*, No. 268,660, 2004 WL 2093567, at *4 (Kan. WCAB Aug. 30, 2004).

[34] See *Phillips v. B & W Contractors*, No. 206,009, 2002 WL 31602546, at *4 (Kan.WCAB Oct. 24, 2002) and *Billups v. National Envelope Corp.*, No. 187,626, 1998 WL 51323, at *4 (Kan. WCAB Jan. 28, 1998).

of business. The purpose of K.S.A. 44-519 is to prevent litigants from bootlegging medical opinions into evidence without the support of a testifying physician. That danger is not present here. The respondent presented no evidence, only argument, in an attempt to show the claimant's medical bills were unrelated to the work injury. There is insufficient reason to question the reliability of the medical bills as related to the work accident.

CONCLUSIONS

The claimant sustained personal injury by accident arising out of and in the course of his employment on April 28, 2015. The depositions of Drs. McMaster and Fevurly are part of the evidentiary record. As a result of his injury by accident, the claimant sustained a 26% impairment to his left lower leg and a 13% impairment to his left arm. The ALJ properly declined to take judicial notice of the OSHA interpretive letters or admit them into evidence. The claimant did not willfully fail to use fall protection or recklessly violate the respondent's safety rules. The claimant is not precluded from compensation based on his injury allegedly being contributed to by drug impairment. The claimant's AWW at the time of the accident was $906.17. The claimant is entitled to future medical treatment and the statutory unauthorized medical allowance. The claimant's medical bills are admissible and he is entitled to payment of past medical bills associated with his work injury.

As required by K.S.A. 44-555c(j), all five members of the Board have considered the evidence and issues presented in this appeal.

AWARD

WHEREFORE, the Board modifies the ALJ's Award on Remand.

For his left lower leg impairment, the claimant is entitled to 24.69 weeks of temporary total disability compensation (TTD)[35] at the rate of $594 per week in the amount of $14,665.86 followed by 42.98 weeks of permanent partial disability (PPD) compensation, at the rate of $594 per week, in the amount of $25,530.12 for a 26% loss of use of the lower leg, or $40,195.98.

For his left arm impairment, the claimant is entitled to 27.3 weeks of PPD compensation, at the rate of $594 per week, in the amount of $16,216.20 for a 13% loss of use of the arm, or $16,216.20.

The total award for TTD and PPD is $56,412.18, all due and owing and shall be paid by the respondent and insurance carrier, less compensation previously paid. In all other respects, the Award on Remand is affirmed.

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[35] The ALJ indicated the claimant was paid $14,677.74 for 26.39 weeks of TTD. Converting the total to weeks paid at the maximum compensation rate of $594 results in 24.69 weeks of TTD having been paid.

IT IS SO ORDERED.

Dated this ____ day of July, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kenton D. Wirth (via OSCAR)
Terry J. Torline (via OSCAR)
Hon. Pamela J. Fuller